Supreme Court, U.S.
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No. 85-492

IN THE

Supreme Court of the United States

October Term, 1985

ROBERT T. DEVERAUX, WILLIAM E. KELLEY, JOHN BAKEY, DONALD J. DENTREMOT and DANIEL J. GATELY,

Petitioners,

against

WILLIAM J. GEARY and THOMAS E. KEOGH,

Respondents,

and

PLAINTIFF-CLASS in CULBREATH v. DUKAKIS,

Intervenors-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief for Phil Caruso as *Amicus Curiae* Interest of Phil Caruso

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Question Presented.

1. Whether the use of racial quotas in awarding promotions is a permissible remedy under Section 706(g) of Title VII, as interpreted by this Court in *Firefighters Local Union No. 1784 v. Stotts*, No. 82-206 (June 12, 1984).

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BRIEF FOR PHIL CARUSO AS *AMICUS CURIAE.*

Interest of Phil Caruso.

Phil Caruso, requests that the Court reopen the submission process in the matter of the Petitioners' Writ of Certiorari for the above-encaptioned case and accept for consideration the present Brief submitted in support of the application for the Writ.

Movant is a citizen of the United States of America and the State of New York, residing in the County of Suffolk. He is also a Police Officer in the Police Department of the City of New York for more than 28 years. He is also President of the Patrolmen's Benevolent Association of the City of New York, the duly recognized bargaining agent for members of the New York City Police Department with the rank of Police Officer. As such, the Patrolmen's Benevolent Association of the City of New York is a public sector labor union representing Police Officers in their relations with their municipal employer. However, this brief is filed on movant's behalf in his personal capacity, and not as President of the Patrolmen's Benevolent Association.

As a Police Officer of more than 28 years standing, Phil Caruso has a great sense of pride in his chosen profession. The major portion of his career has been devoted to the representation of police officers in matters relating to pay, working conditions and basic rights. Consequently, there is a more than ample basis set forth for his qualifications to speak to the issues raised in *Deveraux v. Geary* and, specifically, how quota systems impact on police morale.

Given the multitude of socio-economic problems that currently afflict our society, particularly in the great urban centers of the nation, and, given the undeniable fact that

police officers must necessarily become embroiled in the many and varied confrontational situations coaxed forth by societal ills, the need for a well-trained highly motivated and efficient police force has never been greater.

In this connection, society has placed extraordinary demands upon the police in terms of an awesome burden of responsibility and accountability evoked by legal issues that sometimes even strain the profound omniscience of the esteemed justices of this high court. Accordingly, a police service that must function in such a complex social milieu must recruit the best qualified individuals available, and must thereafter promote only those who manifest a driving initiative to advance in rank. Invariably, those who possess a superior intellect and qualities of leadership rise to the top, a natural process that should not be stifled. In this connection, it is submitted that for a police department to dilute established standards of excellence is irresponsible.

The issues raised in *Deveraux v. Geary* are of no mere academic significance to the New York City Police Officers. In New York City, a recent invocation of a minority quota system for promotion to the Civil Service rank of Sergeant has sparked an intra-departmental conflict that has taken on crisis proportions. A Court-imposed quota system has created widespread dissension within the ranks of New York City Police Officers by arousing deep racial antagonisms. It cannot be an exaggeration to state that these antagonisms have pitted police officer against police officer and brother against brother.

Moreover, even those minority members who have been promoted to the rank of sergeant and who did so while

achieving passing marks, have been unduly branded as failures and have been derisively referred to as "quota sergeants." This is so because approximately 200 minority officers were promoted to the rank of sergeant, in spite of the fact that they failed the last Civil Service promotional exam. To that extent, instead of achieving a desired racial balance, the quota system, which has indelibly attached a condemnational stigma to *all* minority promotees, has actually produced a counterproductive result.

Any police department is a quasi-military organization. As with the military, incentive and morale are vital, indispensible elements that serve to promote the accomplishment of the police mission in our society. At the present time, under the upheaval wrought by court-imposed quota systems, incentive and morale on a collective basis have been shattered. On an individual basis, personal initiative, as well as the basic human aspiration to achieve, have also been destroyed. This uncharacteristic atrophy that now hampers the police service cannot by any means be said to serve the public interest.

A decision by this Court in favor of the Petitioners in the instant matter would serve to greatly restore the integrity of the Civil Service merit system, which, despite occasional minor flaws, has served us well. In both theory and practice, the merit system does not obviate the constitutional rights of any individual. The merit system justly rewards the exertion of a dedicated effort to achieve upward mobility. Conversely, quota systems find vivid expression in a form of convoluted logic that rewards failure in the name of affirmative action.

If the rights of all citizens are to be restored, and it is submitted that the Court-imposed quota systems have, in

the past, violated the rights of many citizens, and if fairness and objectivity are to be resurrected within the instrumentalities of government, and if government is to provide efficient professional services, as is its legal and moral obligation to the people which it serves, then this Court must strike down the irresponsible imposition of quota systems by granting the instant application by Petitioners for a Writ of Certiorari.

Statement.

1. In 1974, certain minority employees brought a suit against their employer, the Metropolitan District Commission, a state agency of Massachusetts, seeking to remedy what they believe to be radically discriminatory hiring and promotion practices occurring within several governmental agencies within that state. In due course, the appropriate representatives of the Commonwealth entered into a stipulation of facts and submitted to the United States District Court for the District of Massachusetts a joint proposal for a Court Order to remedy the claimed transgressions against Plaintiffs and others similarly situated.

According to the stipulation, the facts contained there were considered to be sufficient to state a cause of action by Plaintiffs within the parameters of Title VII of the Civil Rights Act of 1964. The proposed order was to require the state agencies concerned to establish a special minority eligibility list for each job category covered and to select applicants from the list when necessary to meet or maintain the "annual minority hiring objective" for each agency and job category. In short, a quota system to hire and promote minority members was established.

A hearing was held in District Court as to whether the Court should adopt the proposed order. Several unions of civil servants in the Boston area moved to intervene in opposition to the Court adopting the proposed order. In 1979, the District Court of Massachusetts denied the Motions to Intervene by the unions, on the grounds of being untimely. At the same time, the Court adopted the stipulation of facts and the order. The entered order was styled a consent decree. The unions duly appealed. The Court of Appeals affirmed the denial of the Motions to Intervene in *Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980).

In its decision, the Court of Appeals stated that the reason for their affirmance of the District Court was despite the circumstance that the original parties could point to scant prejudice by the supposedly late intervention of the unions. The Court of Appeal stated, however, that the motivating factor for its decision was a concern that allowing the unions to intervene might cause "real prejudice," in that intervention might overturn the consent decree and cause a trial to be had on the issue.

2. In April, 1983, an eligibility list was established for the position of captain of police in the police force of the Metropolitan District Commission. After the two persons with the highest marks were promoted to captain, a black police officer, Donald E. Callender, was appointed captain on July 6, 1984, despite the fact that his examination score was lower than that of the five petitioners in the present case. The stated reason for the appointment was an effort to comply with the quota system for minorities established in *Culbreath*.

Ten days later, on July 16, 1984, the five petitioners filed the present case against their governmental

employers. In their suit, Petitioners alleged that they were the victims of reverse discrimination and that the promotion of Donald Callender deprived them of rights guaranteed by the Fourteenth Amendment and 42 U.S.C. 1981. Petitioners relied upon a case of this Court, *Firefighters Local Union No. 1784 v. Stotts,* 104 S.Ct. 2576 (1984).

The plaintiff-class in *Culbreath* made an application to intervene as a defendant, which was granted. Both the governmental defendant and the *Culbreath* plaintiff-class moved to dismiss the complaint.

3. The District Court granted the Motions to Dismiss. The Court held that the petitioners' suit was an inappropriate attack on the consent decree in *Culbreath,* and the petitioners' suit was construed to be a Motion to Intervene in *Culbreath.* As such, the District Court stated that the matter was governed by the decision of *Culbreath* and that petitioners' suit was out of order on the ground that intervention was untimely. The Court also stated that *Firefighters v. Stotts* was not applicable to the present case.

4. Petitioners duly appealed to the Court of Appeals, First Circuit. There, the District Court's order and reasoning was affirmed. Specifically, the First Circuit agreed that the District Court was correct in treating Petitioners as Intervenors in *Culbreath.*

The Court also agreed with the reasoning of the District Court that *Firefighters v. Stotts* was distinguishable. In general, the Court of Appeals cited with approval the District Court's extremely narrow interpretation of *Stotts.* However, towards the end of its decision, the Court did

acknowledge that the area of law was "difficult and sensitive," and that there was a possibility that the Court was mistaken in its interpretation of existing precedent.

Discussion.

The opinion submitted by the Court of Appeals, First Circuit, it is submitted, contains a virtual invitation for the Court to grant the petition for certiorari. The acknowledgement by the Court that "this is a difficult and sensitive area in which we and other Circuit Courts could be mistaken in our reading of current precedent" (765 F.2d at 275) reflects the concern of the Court of Appeals that the present issue be correctly decided. It is suggested that the Court of Appeals was nervous about affirming the District Court. It might not be too much to state that the Circuit Court would welcome guidance from this Court; so would Petitioners.

The basis for the District Court's decision was the Circuit Court's decision in *Culbreath v. Dukakis,* 630 F.2d 15 (1st Cir. 1980). *Culbreath,* it is submitted, was a flawed decision. Indeed, the decision in *Culbreath* stated that "we see little prejudice to the parties caused by the failure of the unions to intervene more promptly." *Id.* at 22. Moreover, the Circuit Court was more concerned with putting into effect the current consent decree, instead of resolving its defects. See *Id.* The Court readily acknowledged the existence of the defects but refused to take any corrective measures.

This approach was later incorporated into the present case. In order to reach a decision, the District Court followed the four-factor test that was established in *Stallworth v. Monsanto Co.,* 558 F.2d 257, 264 (5th Cir. 1977), and which was used in the *Culbreath* case.

It is submitted that the Petitioners met the first factor of the test; "the length of time the potential intervenors knew or reasonably should have known of their interest before they petitioned to intervene." Petitioners, in the present case, although members of the Metropolitan District Commission, were not aware of their interest until ten days prior to the commencement of this action. While the consent decree was entered into in December, 1978, Petitioners, at that time, were not interested members with a right to intervene. Therefore, Petitioners' interest did not accrue until they were passed over for the promotion.

This Court must remember, as was pointed out in *Firefighters Local Union No. 1784 v. Stotts,* 104 S.Ct. 2576, 2586 (1984), that the non-minority employees, themselves, were not parties to the consent decree when it was entered into. Therefore, the terms of the decree cannot be said to indicate any agreement that they entered into. Without the opportunity for them to agree or disagree with the terms of the consent decree, the Petitioners have been unable to take any corrective measures that might prevent the decree from impeding upon their rights. Therefore, Petitioners have commenced their action within a timely fashion and therefore certiorari should be granted.

The second factor, "the prejudice to existing parties due to the potential intervenor's failure to petition for intervention promptly," it is submitted, will not cause undue prejudice to the existing parties if the Petitioners are allowed to intervene. The First Circuit, itself, stated that "we see little prejudice to the parties caused by the failure of the unions to intervene more promptly." See 630 F.2d at 22. In *Culbreath,* the unions attempted to intervene approximately four years after they received notice of the

suit. By contrast, in the present case, Petitioners commenced the suit only ten days after they were notified that one of their colleagues was to pass over them in promotion, solely on the basis of race. Moreover, by no means were Petitioners parties to the consent decree, nor were they in agreement with that document. Accordingly, the reversal of the Courts below would not unduly prejudice any party.

The third factor, "the prejudice the petitioners would suffer if they were not allowed to intervene," would be an undue burden that would be entirely borne by the Petitioners themselves. Petitioners' rights to intervene did not accrue until they were denied their right to a promotion. While the Metropolitan District Commission stipulated to allegations that in the past it was guilty of discriminatory practices, this stipulation causes no harm to the Metropolitan District Commission, but tremendous prejudice to Petitioners.

The fourth factor, "the existence of some unusual circumstances militating either for or against intervention," is dictated by this Court's decision in *Firefighters v. Stotts, supra.* It is submitted that this Court's decision in the case created an unusual circumstance with respect to the present controversy. Therefore, it is for this Court to grant Petitioners that which the Courts below have declined to do. It is submitted that the *Stotts* decision has created a change under Title VII and therefore dictates that the consent decree at issue here should be modified or extinguished entirely.

The First Circuit, while affirming the District Court's decision, appears to have acknowledged that such a sweeping action might be called for. However, it is suggested

that the Court of Appeals was reluctant to take such a drastic step, when it stated that, "we recognize, of course, that this is a difficult and sensitive area in which we and the other Circuit Courts could be mistaken in our reading of current precedent." *Deveraux,* 765 F.2d at 275.

For this reason, as was pointed out at the outset of this discussion, the Court below appeared to call upon this Court to closely review its decision in this case.

Conclusion.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD HARTMAN
Attorney for Phil Caruso

October 1985